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No. 90-95

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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Whether the Court of Appeals correctly concluded that §434 of the Federal Railroad Safety Act, 45 U.S.C. §434, preempts state regulation of the transportation of hazardous materials by rail.

LIST OF PARTIES AND RULE 29.1 LIST OF AFFILIATES

The parties before the Court of Appeals and this Court are all listed in the caption.

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;
Allegheny and Western Railway Company;
Augusta and Summerville Railroad Company;
The Baltimore and Cumberland Valley Railroad Extension Company;
The Baltimore and Philadelphia Railroad Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
Clearfield and Mahoning Railway Company;
The Cleveland Terminal & Valley Railroad Company;
Dayton and Michigan Railroad Company;
Dayton and Union Railroad Company;
The Home Avenue Railroad Company;
The Lakefront Dock and Railroad Terminal Company;
North Charleston Terminal Company;
Richmond-Washington Company, which has a subsidiary, RF&P Corporation;
Winston-Salem Southbound Railway Company;
Woodstock & Blockton Railway Company;
Mid-Allegheny Corporation

Norfolk and Western Railway Company is a wholly-owned subsidiary of Norfolk Southern Corporation, a publicly-owned corporation. The following majority-

owned subsidiaries of Norfolk Southern Corporation have public stockholders:

High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
The North Carolina Midland Railroad Company
The South Western Railroad Company
Southern Railway Company
State University Railroad Company
Wabash Railroad Company
Yadkin Railroad Company

Grand Trunk Western Railroad Company is a wholly owned subsidiary of Grand Trunk Corporation which is owned by Canadian National Railways, a Canadian crown corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents CSX Transportation, Inc., Consolidated Rail Corporation, Norfolk and Western Railway Company and Grand Trunk Western Railroad Company, respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit in this case. The opinion of the Sixth Circuit is reported at 901 F.2d 497. The opinion of the United States District Court for the Southern District of Ohio, which was affirmed by the Sixth Circuit, is reported at 701 F.Supp. 608.

STATEMENT OF THE CASE

On September 26, 1988, the Ohio General Assembly enacted the Ohio Hazardous Materials Transportation Act ("OHMTA"). That Act authorized the Public Utilities Commission to adopt and enforce regulations relating to the transportation of hazardous materials by all modes of transportation, including rail. On September 27, 1988, Respondents brought this action to enjoin enforcement of those provisions of the OHMTA applicable to rail carriers and to obtain an order from the district court declaring all such provisions invalid because they are preempted by federal law and are an undue burden on interstate commerce. Specifically, Respondents sought an order from the district court (1) declaring Ohio Revised Code ("O.R.C.") §§4905.80, 4905.81, 4905.83 and 4907.64, and all regulations issued pursuant thereto, invalid as applicable to rail carriers under the United States Constitution Article VI, Clause 2 (the Supremacy Clause) and Article I, Clause 3, Section 8 (the Commerce Clause) and the express preemption provisions of both the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §421 *et seq.* and the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §1811 *et seq.*, and (2) preliminarily and permanently enjoining the enforcement of each such statute and regulation as to rail carriers.

Upon representation by the Ohio Public Utilities Commission ("PUCO") that regulations enacted pursuant to the OHMTA would not become enforceable against rail carriers until December 10, 1988, Respondents withdrew their request for preliminary injunctive relief and submitted a Motion for Partial Summary Judgment on October 26, 1988. Respondents sought a declaratory judgment and requested that the PUCO and its Chairman and Commissioners (hereinafter, collec-

tively "the PUCO") be permanently enjoined from enforcing the Ohio statutes and regulations because state regulation of the transportation of hazardous materials by rail is preempted by the explicit terms of both the FRSA and the HMTA.

On November 10, 1988, the PUCO filed a Cross-Motion for Partial Summary Judgment. The PUCO argued that the Ohio statutes and regulations are not preempted by the FRSA or the HMTA and are, in fact, specifically authorized by the HMTA. On that basis, the PUCO requested an order from the district court declaring O.R.C. §§4905.81, 4905.83 and 4907.64, and all regulations thereunder, valid and enforceable under the Supremacy Clause.

The preemption provision of the FRSA reads:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. *A state may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order or standard covering the subject matter of such state requirement.* A state may adopt or continue in force an additional or more stringent standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434 (emphasis added). The operation of this provision is straightforward: if no federal regulation covers a railroad safety matter, the states may regulate; if federal regulation addresses a "subject matter" which

relates to "railroad safety," the states are preempted from regulating unless they meet the three part test of §434 -*ie.*, state regulation is more stringent and addresses a local safety hazard, state regulation is not incompatible with federal law, and state regulation does not impose an undue burden on interstate commerce. *See, e.g., Missouri Pacific Ry. Co. v. Railroad Comm. of Texas*, 671 F.Supp. 466, 671 (W.D. Tex. 1987), *aff'd.*, 850 F.2d 264 (5th Cir. 1988).

There is no question that the regulations issued pursuant to the OHMTA address a "subject matter" as to which the Secretary has already "adopted a rule, regulation, order or standard." Indeed, except in a few material respects, the Ohio regulations governing the transportation of hazardous materials are identical to those adopted by the Secretary pursuant to the HMTA. There is also no question that the OHMTA regulations could never satisfy the three part test for an exception to §434 because they were enacted on a state-wide, rather than local, basis. Accordingly, all parties and both of the lower courts agree that the issue which is determinative of the applicability of the preemptive bar of §434 is whether regulations governing the transportation of hazardous materials by rail adopted under the HMTA are regulations governing an area of "railroad safety" under the FRSA.

Following a hearing on November 30, 1988, the district court concluded that the Ohio statutes and regulations governing the transportation of hazardous materials by rail *do* constitute laws relating to "railroad safety" and, thus, are preempted by the explicit preemption provision of the FRSA, 45 U.S.C. §434. *CSX Transportation, Inc. v. Public Utilities Commission of Ohio*, 701 F.Supp. 608, 617 (S.D. Ohio 1988). Having concluded that those statutes and regulations are preempted, the

court declared them invalid under the Supremacy Clause and entered a permanent injunction against their enforcement on December 10, 1988. *Id.* 701 F.Supp. at 618.

The district court found that its decision as to preemption under the FRSA was determinative of the invalidity and unenforceability of the Ohio provisions and that further inquiry was, thus, unnecessary. *Id.* Hence, without considering whether the OHMTA regulations were also preempted under the preemption provision of the HMTA, the district court entered a Rule 54(b) order finding "no just reason for delay" and the matter was appealed to the United States Court of Appeals for the Sixth Circuit.[1]

In an opinion issued April 13, 1990, the Sixth Circuit affirmed the decision of the district court in its entirety, finding:

1. that the HMTA is a law relating to railroad safety, even if regulations pursuant to it are promulgated by the Secretary of Transportation

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[1]The HMTA preemption provision is narrower than that of the FRSA. It provides:

> Any requirement of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA], is preempted.

40 U.S.C. §1811(a). Because the OHMTA requirements differ in certain material respects, most particularly with respect to the imposition of penalties, from those issued under the HMTA, Respondents contend that the Ohio regulations are inconsistent with their federal counterparts and are, thus, also preempted under the preemption provision of the HMTA. Because they agreed that the Ohio regulations are barred by §434 of the FRSA, neither of the courts below reached the issue of whether those regulations were also barred by the HMTA.

directly rather than by the Federal Railroad Administration (*CSX Transportation, Inc., v. Public Utilities Commission of Ohio*, 901 F.2d at 497, 501);

2. that, in giving the Secretary of Transportation authority to promulgate regulations involving the intermodal transportation of hazardous materials under the HMTA, Congress did *not* concurrently repeal the broad historic federal preemption of state railroad regulation (*Id.*); and

3. that, as a result of 1 and 2 above, the language of the preemption provision in the FRSA, "any law . . . relating to railroad safety," applies to the HMTA as it relates to the transportation of hazardous materials by rail and, thus, operates to preempt state regulation of that subject matter. (*Id.*).

REASONS FOR DENYING THE WRIT

A. THE DECISIONS OF THE LOWER COURTS ARE IN ACCORD WITH THE DECISIONS OF EVERY OTHER COURT TO HAVE CONSIDERED THE ISSUE

The district court and court of appeals in this case are not alone in concluding that regulations adopted by the Secretary pursuant to the HMTA constitute regulations "by the Secretary" regarding an area of "railroad safety" and that they therefore preempt state regulation as to that subject matter. Every court to consider the question has reached the same conclusion.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Ill. Commerce Comm.*, 453 F.Supp. 920 (N.D.Ill. 1977) the District Court for the Northern District of Illinois considered the preemptive effect of both the FRSA and

the HMTA on regulations issued by the Illinois Commerce Commission governing the handling of tank cars containing hazardous materials. The court concluded that any action taken by the Secretary, whether under the HMTA *or* the FRSA, must be considered in determining whether the Secretary has "covered the subject matter" addressed by state regulation. The court said:

> However, these statutes do not require the overly technical interpretation which would subject orders and regulations issued by the Secretary under one law to a different preemption standard than those under another. [FRSA and HMTA] The Railroad Safety Act of 1970 provides that state action is preempted when the Secretary has issued orders or regulations covering the field. *This is not limited merely to those promulgated under that Act, but refers instead to any action taken by the Secretary* . . . Any more narrow interpretation of the Railroad Safety Act would frustrate its stated purpose of establishing uniform national standards.

453 F.Supp. at 924. (Emphasis added).

Similarly, in *Missouri Pacific Ry. Co. v. Railroad Comm. of Texas*, 671 F.Supp. 466 (W.D.Tex. 1987), *affd.*, 850 F.2d 264 (5th Cir. 1988), the court explained:

> §434 refers to acts by "the Secretary," referring to the Secretary of Transportation, and does not confine itself to acts pursuant to the FRSA. Thus, an act by the Secretary pursuant to, for example, the HMTA could preempt state law under the terms of §434.

671 F.Supp. at 471 n.4 and 482.

Finally, in *CSX Transportation, Inc. v. City of Tullahoma*, Case No. Civ. 4-87-47, slip op. at 11 (E.D.Tenn. Feb. 17, 1988), Judge Jarvis stated:

> . . . Transportation of hazardous materials is regulated by the Secretary of Transportation under both the HMTA and the FRSA. Although the preemption standard is somewhat different under the two acts, under the FRSA, state action is preempted when the Secretary has issued orders or regulations covering the field. *Preemption is not limited to those regulations promulgated under the FRSA, but refer instead to any other rule, regulation, order, or standard covering the subject matter and adopted by the Secretary.*

Id. (Emphasis added).

Thus, the issue presented to this Court is not one that has confused the various lower federal courts or has engendered debate among them. It is an issue which has resulted in uniform, unequivocal findings that the preemption provision of the FRSA applies with equal force to all regulations issued by the Secretary of Transportation, including those issued pursuant to the HMTA. This fact alone militates strongly against any need for consideration by this Court.

B. THE DECISIONS OF THE LOWER COURTS ARE CONSISTENT WITH ALL CONGRESSIONAL PRONOUNCEMENTS ON THE ISSUE

1. The Decisions in This Case are the Only Ones Which Will Further the Congressional Goal of National Uniformity in the Regulation of Rail Safety

The first sentence of §434 of the FRSA states unequivocally Congress' objective with respect to *all* rail-

road safety laws: national uniformity. Congress declared that "laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. §434. The legislative history and enforcement structure of the FRSA confirm that, given the uniquely interstate character of railroads, Congress determined that national uniformity was critical not just in the adoption of standards, but, importantly, also in the interpretation, application and enforcement of those standards as well.

The House Report accompanying the 1970 Act gives a detailed description of the interstate character of railroad systems, and persuasively states the resulting need for national uniformity in both regulation and enforcement:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. *It is a national system* . . . [T]he vast bulk of railroad mileage, and operations thereof, are by companies whose operations extend over many State lines . . . The integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operation rules, signal systems, power supply systems, and communication systems of a single company normally cross many State lines. *To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.*

H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted* in, 1970, *U.S. Code Cong. & Admin. News* 4104, at 4110-4111.

This point is reiterated often in the relevant legislative history:

> The Committee does not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of *enforcement* in 50 different judicial and administrative systems. *Accordingly, while it has preserved the framework of certification, it has modified the concept insofar as it applies to the nation's rail system to make all enforcement Federal in nature.*

Id. at 4409 (emphasis added).

> It is the policy of Congress that rail safety regulations be nationally uniform to the extent possible [O]nce the Secretary [of Transportation] has prescribed a uniform national standard, the State would no longer have authority to establish statewide standards with respect to rail safety.

Id. at 4116-17.

This goal of national uniformity was carefully integrated into the statutory framework of the FRSA. The FRSA accomplishes its objective in two specific ways: (1) it preempts *all* state and local laws relating to rail safety to the extent the Secretary has promulgated regulations covering the same subject matter; and, (2) through §435, it returns to the states a very limited role with respect to some, *but not all*, of the areas as to which there is preemption. Thus, the role of the states under the FRSA is strictly limited to surveillance and inspection activities, 45 U.S.C. §435(a), while Congress reserved to the Secretary the *exclusive* power to assess and compromise penalties, and, except in very limited circumstances, to seek injunctive relief.

The concept of preemption of state regulation accompanied by severely limited state involvement in enforcement of federal requlations was central to the Congressional intent in passing the FRSA. Indeed, the legislative history makes plain that the question of what role would be permitted the states in the regulation of railroad safety was the most thoroughly debated portion of the FRSA. Thus, for example, Representative Springer observed during the hearings on the FRSA before the House Subcommittee on Transportation and Aeronautics:

> *I think this [preemption] is the great area of problem*, Mr. Secretary, where there would be a possibility, this is just opinion, but I think I can read that this would be the area probably where we might have the most agreement or disagreement about what ought to be done. *I think this is really what the turning point of the bill will be, in my opinion.*

See, Hearings Before The House Subcommittee on Transportation and Aeronautics, May 17, 19, 22 and 23, 1970, regarding the Federal Railroad Safety and Hazardous Materials Control Legislation, U.S. Government Printing Office, at p.43.

Similarly, Representative Kuykendall captured the sense of Congress when he noted:

> There is not much disagreement with this bill and *it seems to me that almost the entire area of disagreement has now been pretty well isolated.* Disagreeing with your position on the overall goals of this bill would be just like disagreement with God and motherhood. You just don't do it. *So lets get to the area of discussion of what we are faced with, the problem of preemption and authority of the different levels of regulatory agencies.*

Id. at 141.

Thus, "[t]he legislative history of the FRSA shows that the issue of Federal preemption was vigorously debated, leaving a clear record of Congressional intent for virtually complete preemption in the area of railroad safety laws." *Norfolk & Western Railway Company* v. *The Public Utilities Commission of Ohio*, 727 F.Supp. 367, 369 (S.D.Ohio 1990) (finding that §434 of the FRSA preempts state regulations mandating walkways at rail crossings where the Secretary had decided not to mandate the same).

The district court and court of appeals in this case both explicitly recognized that the challenged Ohio statutes turned Congressional intent on its head. As the district court found, "Ohio has attempted to do precisely that which Congress sought to prohibit." *See, CSX Transportation, Inc.* v. *The Public Utilities Commission of Ohio*, 701 F.Supp. at 617. The decisions below correctly protect Congressional objectives by prohibiting the State of Ohio from adopting regulations similar to those promulgated by the Secretary relating to the transportation of hazardous materials by rail, and from imposing a mechanism for enforcement of those laws by state officials through the assessment of fines and forfeitures and through the prosecution of administrative and judicial proceedings.

Moreover, the implications of Ohio's actions go well beyond authorizing regulation and enforcement at the state level. Had the lower courts accepted the PUCO's contentions as true, regulation of the rail transportation of hazardous materials could conceivably occur at *all* non-federal levels, bogging the nation's railroads, so national in scope and character, in a welter of local regulations and enforcement schemes. Such a

result would have been at extreme odds with the Congressional goal of national uniformity in this area.

As the court stated in *City of Covington, Kentucky v. The Chesapeake & Ohio Railway Co.*, 708 F.Supp. 806, 809 (E.D. Ky. 1989), *quoting, Consolidated Rail Corp. v. Smith*, 664 F.Supp. 1228, 1238 (N.D. Ind. 1987), a case in which a local speed ordinance was held to be preempted:

> Congress was concerned that the existence of fifty separate regulatory systems in the fifty states would undermine safety. If so, separate regulation by every city, village, township, or hamlet along the mainline would undermine safety infinitely more.

Thus, it is apparent that the lower courts carefully examined and took their lead from all relevant Congressional expressions of policy in reaching their decisions in this case. This conservative adherence to the well and oft-expressed intentions of Congress certainly does not demand further scrutiny by this Court.

2. The Lower Courts' Conclusion That Congress Did Not Remove the Transportation of Hazardous Materials by Rail From the Ambit of "Railroad Safety" Under §434 Was Guided by and Consistent With the Dictates of This Court Regardinq Interpretation of Congressional Intent

The PUCO does not dispute that when Congress enacted the FRSA in 1970 and used the phrase "laws . . . relating to railroad safety" in the preemption provision therein, regulations governing the transportation of hazardous materials were consciously and ex-

pressly included within that language. The legislative history and structure of the FRSA make that conclusion irrefutable. The PUCO contends, however, that the legislature subsequently altered that legislative scheme and *removed* hazardous materials regulation from the universe of rail safety matters addressed under §434. Both the district court and the Sixth Circuit concluded that adopting the PUCO's position would demand that they ignore relevant and specific guidelines for the resolution of questions regarding legislative intent dictated by this Court.

Both the district court and the Sixth Circuit concluded that, since there is no language in the FRSA or the subsequently enacted HMTA, or in the legislative history of either, which explicitly states that, by virtue of the HMTA, states are now free to regulate in areas from which they had been previously excluded under §434, the PUCO's argument must be viewed as one urging the "implied repeal" of §434.[2] And, both recognized that it is a fundamental principle of statutory construction that the implied repeal of an earlier statute by mere enactment of a later, even potentially conflicting one, is disfavored and should be avoided whenever possible. *See e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984) (Supreme Court has consistently rec-

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[2]A statute is expressly repealed [only] when the later law "*designates the statute repealed in such manner as to leave no doubt as to what statute is intended.*" *Equitable Life Assur. Soc. of U.S. v. Gresvenor*, 426 F.Supp. 67, 71 (W. D.Tenn. 1976), *affd.* 582 F.2d 1279 (6th Cir. 1978), *cert denied*, 439 U.S. 1116 (1979) (emphasis added). *See also U.S. v. Hansen*, 772 F.2d 940 (D.C. Cir.), *cert. denied*, 475 U.S. 1045 (1985) (courts should assume Congress will expressly designate *each of the provisions* of former related statutes whose application it wishes to suspend by later statutory enactment). There is absolutely no evidence of an express repeal of §434, either through the enactment of the HMTA or otherwise.

ognized that repeals by implication are disfavored); *TVA v. Hill*, 437 U.S. 153, 189-90 (1978) (disfavor of implied repeal is "cardinal rule"; intent to repeal or amend must be "manifest"); *U.S. v. United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976) (disfavor of implied repeal carries great weight; court should be hesitant to infer that Congress meant to invade or narrow scope of pre-existing statute without explicitly expressing intent to do so).

It was on these dictates of this Court that the lower courts based their conclusion that they must find a "clear" and "manifest" intent by Congress to repeal or amend §434 before they could conclude that the regulation of the transportation of hazardous materials by rail was no longer to be considered an area of "railroad safety." Not only were the lower courts unconvinced that Congress had manifested any such intent, they concluded that there was, in fact, evidence of a contrary intention — *i.e.*, to preserve the applicability of the preemptive effect of §434 in this context.

The PUCO's petition, as did its briefs in the courts below, seeks to make much of the asserted shift from a "modal" to an "intermodal" approach to the regulation of hazardous materials and the transfer of regulatory authority from the FRA (where it resided by delegation from the Secretary) to the Secretary. The PUCO's arguments were rejected by the courts below for good reason. As the Sixth Circuit explained:

> Although we credit the PUCO's compelling argument that the creation of the HMTA in 1974 removed promulgation (though not enforcement) of regulations under the Explosives Act from the FRA, we do not believe that such removal changes the fact that FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated*

> *by the Secretary,* whether or not such regulations are promulgated by the FRA through power delegated by the Secretary. See 45 U.S.C. §434. Clearly, the HMTA is a law relating to railroad safety, even if regulations pursuant to it are promulgated by the Secretary directly, not by the FRA.
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> 901 F.2d at 501.

Similarly, the trial court observed:

> Defendants point out that the HMTA transferred regulatory authority over hazardous materials transportation from the Federal Railroad Administration (FRA) to the Secretary of the Department of Transportation and argue that this signifies a Congressional intent that such regulations should not be governed by the preemption provisions of the FRSA. Defendants overlook the fact that the preemption provisions of the FRSA apply to rail safety measures adopted by the Secretary, not the FRA. By transferring hazardous materials regulation from the FRA to the Secretary, Congress did not in any way separate railroad safety regulation from hazardous materials regulation, rather, the Secretary is responsible for both. Indeed, as noted, the FRSA preemption provision is tied to railroad safety regulations adopted by the Secretary, not by the FRA. Defendants' argument would make sense only if FRSA preemption was in fact tied to regulations adopted by the FRA and plainly it is not.
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> 701 F.Supp. at 608.

The lower courts also recognized that Congress did not alter the scope of §434 following judicial and administrative applications of §434 to regulations promulgated by the Secretary pursuant to the HMTA.

Congress amended the FRSA and the HMTA in 1980. When it did so, it had been made expressly aware that the Department of Transportation ("DOT"), the federal agency that promulgates regulations under the HMTA, believed that the FRSA preemption provision applied to regulations relating to the transportation of hazardous materials *by rail*:

> The preemption provisions of the Hazardous Materials Transportation Act operate to preempt any State or local requirement that is "inconsistent" with the Federal regulation. Unless it is "inconsistent," a State or local requirement is not preempted. *In the case of a State or local restriction directed at rail transport, there is a second Federal statutory provision that acts to further limit the legal authority of States and localities. Under the Railroad Safety Act*, a State or locality is expressly preempted from any "additional or more stringent" rail safety requirement unless it is "necessary to eliminate or reduce a local safety hazard."

Hazardous Materials Transportation Act Amendments: Joint Hearing Before the Subcommittee on Surface Transportation and Subcommittee on Aviation of the Committee on Public Works and Transportation on H.R. 3502, 96th Cong., 1st Sess. 33 (1979).

At that point, Congress was also presumably aware of judicial interpretations regarding the interplay of the FRSA and the HMTA concluding that the preemption provision in the former applied to regulations issued pursuant to the latter. Indeed, given that *Atchison, Topeka & Sante Fe Co. v. Ill. Commerce Commission*,[3] *supra*, which reaches the same result reached by the lower

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[3]Significantly, the United States intervened on the side of the plaintiff railroads in *Atchison*. See, 453 F.Supp. at 922.

courts in this case, had been decided three years earlier, Congress is *deemed by law* to have been aware of the *Atchison* holding when it addressed these statutes in 1980. *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir.), *cert. denied*, 464 U.S. 1007 (1983), *citing Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) ("Congress is deemed to know executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning . . . ") *See also, Cannon v. University of Chicago* 441 U.S. 677, 696-97 (1979); *St. Regis Mohawk Tribe, New York v. Brock* 769 F.2d 37, 50 (2d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

As precedent from this Court dictates, Congress' failure to amend the FRSA or HMTA preemption provisions in response to either the *Atchison* holding or the DOT's advice regarding the construction of those provisions, or to in any way rebut or reject the judicial and administrative interpretations given to the interrelationship between those Acts, must be read as acceptance of those interpretations. *See CSX Transportation, Inc. v. Public Utilities Commission of Ohio*, 701 F.Supp. at 615-16.

Moreover, not only did Congress not act to change the FRSA or the HMTA in response to these judicial and administrative interpretations, but, instead, it actually reaffirmed them. In 1980, Congress added a "whistle blower" provision to the FRSA, and included in that provision a definition of "railroad safety law" that expressly included the HMTA. *See*, 45 U.S.C. §441(e). The statutes listed in that section (the HMTA and those laws under the jurisdiction of the Secretary pursuant to 49 U.S.C. §1655(1), (2) and 6(A)) are the same as those included in Appendix B to the 1970 legislative history

and referred to there as the laws relating to railroad safety. The only difference is that the HMTA is substituted for its predecessor, the Explosives Act. *See*, 901 F.2d at 500; 701 F.Supp. at 613. Thus, Congress' definition of railroad safety laws in 1980 was precisely the same as in 1970 and plainly included laws governing the transportation of hazardous materials by rail.

Thus, the lower court decisions which the PUCO asks this Court to review are not only consistent with all other judicial decisions on the issue and with Congress' desire to further the goal of nationally uniform regulation of rail safety, they are also consistent with the most recent administrative and legislative pronouncements on the precise question put to those courts.

C. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

1. The Supreme Court Pronouncements to Which the PUCO Refers are Neither Controlling Nor Relevant

The PUCO contends that this Court must grant certiorari to review the Sixth Circuit's decision in this case because that decision is inconsistent with two earlier decisions of this Court on the issue of federal preemption: *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) and *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190 (1983). Not only does the Sixth Circuit decision in this case not create a conflict with these precedents which is worthy of this Court's review, but these precedents are not even relevant to the preemption analysis at issue in this case.

The *Louisiana* case involved the interpretation of a *single* statute in which *exclusive* jurisdiction over the

regulation of interstate wire and radio communications had been granted to the federal government and *exclusive* jurisdiction over intrastate communications of that nature had been granted to the states. When the Federal Communications Commission dictated depreciation methods for telephone plants and equipment, the question arose whether that act preempted the states from dictating the use of alternative methods of depreciation in connection with the establishment of intrastate telephone rates. This Court concluded that, in the face of the explicit and separate grants of authority to the respective spheres of government within the single statute at issue, the mere fact that a federal agency had chosen to act on an issue first could not forever prohibit the states from acting in the area of authority granted to them.

That case is simply not this one. First, it does not involve, as here, the interpretation and determination of the interplay between two competing federal preemption provisions addressing overlapping subject matters. Second, it does not involve, as here, a situation in which the federal government has been granted broad regulatory authority over *an entire subject matter* — *i.e.*,"railroad safety," and where the "reservation of authority" to the states, to the limited extent it occurs, not only expressly overlaps with that already granted to the federal government (as opposed to being reserved in a separate sphere of authority), but also was made in the face of Congressional recognition that that authority would be limited whenever and to the extent it conflicted with the broad federal authority outlined in the FRSA.

The *Pacific Gas* case is equally inapposite. There, the Court again was faced with grants of authority within a *single* statute. The federal government was

granted the authority to build nuclear power plants and exclusive authority to regulate their safety. The power to promulgate non-safety regulations for such facilities was expressly reserved to the states in that same enactment. The question presented was whether the state could regulate nuclear facilities for economic purposes (as opposed to safety purposes) in a manner which imposed requirements which were more stringent than those the federal government had seen fit to implement. The Court concluded that the single statutory scheme of dual regulation at issue there had explicitly permitted state regulation in the sphere in which the state sought to regulate, no matter what the applicable federal agency had done under its independent grant of authority.

Again, that is not this case. The issue here is the interplay between *two separate federal preemption provisions*, including one that preempts state regulation over an entire subject area, and a consciously and strictly limited non-exclusive role for the states. The issues are different. As both of the lower courts and every other court to consider the issue have decided, the results should differ as well.

2. The Lower Court Decisions Were Dictated By This Court's Admonitions Regarding the Proper Approach to the Reconciliation of Two Potentially Conflicting Federal Statutes

Both of the lower courts recognized that when hazardous materials are transported by rail, that act logically is governed both by the FRSA, an act addressing itself to all aspects of rail transportation, and the HMTA, an act addressing itself to all forms of hazardous materials transportation. *See, CSX Transportation, Inc. v. Public Utilities Commission of Ohio*, 901 F.2d at 501. Both

courts also recognized, however, that, when faced with overlapping and even potentially conflicting statutes, a situation *not* present in either the *Louisiana* or *Pacific Gas* case, their role is not to choose one statute over the other or assume that an implied repeal of the earlier one was intended, but to seek to harmonize the two and attempt to give effect to any overriding Congressional intent.

As noted by the Ninth Circuit in adhering to clear Supreme Court pronouncements on the issue,

> [W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard *each* as effective. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1975), *quoting Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2472, 41 L.Ed. 290 (1974).

Get Oil Out!, Inc. v. Exxon Corp., 586 F.2d 726, 729 (9th Cir.1978). (Emphasis added).

This Court recently applied these principles in *Ruckelshaus v. Monsanto*, 476 U.S. 986 (1984). There, the Court was faced with an alleged conflict between the Tucker Act, 28 U.S.C. §1491, and the later Federal Insecticide, Fungicide and Rodenticide Act ("FIRFA"), 7 U.S.C. §136, *et. seq.* FIRFA limited the remedy for the taking of a property interest under that Act to resort to the Environmental Protection Agency. Despite this clear limitation, the Supreme Court applied the principles articulated above, and concluded that FIRFA should not be read to have impliedly repealed the Tucker Act's grant of jurisdiction to the district courts with respect to "taking" claims, especially in light of Congress' overriding concern with providing compensation to victims of a governmental taking. Hence, even though the statute was not written that way, this Court

concluded that FIRFA's remedy provision was to be interpreted as a requirement that administrative remedies be exhausted prior to resort to a Tucker Act claim.

Applying these principles to the instant case, the district court concluded that:

> the most logical way to resolve any conflict is to give effect to the specific preemption language of the FRSA (which by its literal language applies to all rail safety regulations adopted by the Secretary) while applying the more liberal preemption standard of the HMTA to regulations adopted with respect to other modes of transportation.

CSX Transportation, Inc. v. The Public Utilities Commission of Ohio, 701 F.Supp. at 614. The Sixth Circuit similarly concluded:

> We agree with the PUCO that our preemption analysis "is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted'." *Merrill Lynch v. Ware*, 414 U.S. 117, 127 (1973), *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) (citations omitted). However, we do not agree with the PUCO's interpretation of this language in this case. A failure to follow the preemption provision of the HMTA in no respect ousts the HMTA. In this case, the decision of the district court, applying the FRSA preemption provision to regulations promulgated under the HMTA, retains the essential character and purpose of both statutes. The national character of railroad regulation and the need for regulation of hazardous materials transportation on an intermodal basis are both respected.

CSX Transportation, Inc. v. Public Utilities Commission of Ohio, 901 F.2d at 502-03. These are the obvious and correct conclusions in the circumstances presented.

In passing the FRSA, Congress' overriding objective was to promote national uniformity in the regulation of all areas of rail safety. As the lower courts concluded, this fact is evidenced both by the legislative history of the 1970 Act and by the structure of the FRSA itself, and has been reaffirmed every time Congress has addressed the issue since 1970.

The lower courts rightly sought to protect these legislative objectives by preserving the statutory framework which was carefully designed to further them. For the lower courts to have done otherwise would have been contrary to Congress' unambiguously stated conclusion that it did "not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 1194, 91st Cong. 2d Sess.

At the same time, the lower courts' holdings leave wholly intact the central objectives of the HMTA. As the PUCO itself contends, the HMTA was designed to consolidate the power to promulgate regulations relating to the transportation of hazardous materials *in the Secretary of Transportation*. In so doing, national uniformity in regulation was also an objective of the HMTA. Congress intended nationally uniform regulations to control in this area in order to "preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1192, 93rd Cong., 2d Sess. 37 (1974). The lower courts' decisions do no damage to these objectives. There is nothing in the HMTA or its legislative history that

suggests that one of Congress' considered purposes in enacting the HMTA was to grant the states full authority to enforce regulations relating to the transportation of hazardous materials *by rail*. The HMTA's preemption provision, in sharp contrast to that of the FRSA, was the subject of essentially no congressional discussion. The breadth of the HMTA preemption provision is not the result of a plainly expressed congressional intent to unravel the careful statutory scheme it had created in the FRSA and, as the PUCO contends, to create a "dual" federal/state system of regulation and enforcement. Rather, the breadth of the HMTA provision is the result of the fact that the HMTA is applicable to so many different areas of commerce and that Congress fully anticipated that its effect would be tempered by any stricter, mode-specific preemption provisions already in place.

Where the decisions for which review is sought not only do not conflict with any other decision of this Court or with any decision of any other court, but actually are based upon and adhered to clear guidelines for analysis set down by this Court, there is simply no need for this Court to reconsider them.

CONCLUSION

Petitioner has failed to show any conflict between the decision of the Sixth Circuit Court of Appeals and prior decisions of this Court or of any other federal court. Petitioner has also failed to show any other basis for this Court to hear this case. The Sixth Circuit's decision is consistent with all relevant expressions of Congressional intent and with the guidelines for decisionmaking delineated by this Court. The Sixth Circuit's decision is and should remain unassailable. Accordingly, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Samuel H. Porter, a member of the Bar of this Court and counsel for respondents herein, hereby certify that on the 29th day of August, 1990, three copies of the Brief in Opposition to the Petition for Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit were served, postage prepaid, upon Anthony J. Celebrezze, Jr., Attorney General of Ohio, Robert S. Tongren, Assistant Attorney General, Counsel of Record, James B. Gainer, Assistant Attorney General, Counsel for Petitioner, at the Office of the Ohio Attorney General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43266-0573.

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